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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

Charles W. Posey,
Petitioner,

vs.

Clark Equipment Company,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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NO. _____

CHARLES W. POSEY,

Petitioner

vs.

CLARK EQUIPMENT COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit affirming an order of the United States District Court for the Southern District of Indiana (Indianapolis Division), granting Respondent's (Defendant below) Motion for a Directed Verdict at

the conclusion of all proofs in an action for personal injuries founded on Diversity of Citizenship.

OPINION BELOW.

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 409 F.2d 560 (1969) and is set forth in Appendix A to this petition.

JURISDICTION.

The jurisdiction of the District Court is based upon Diversity of Citizenship, 28 U.S.C. 1332. The opinion and judgment of the United States Court of Appeals was made and entered on April 15, 1969. Its jurisdiction was based upon 28 U.S.C. 1291. A Petition for Rehearing was filed and denied on June 4, 1969.

QUESTION PRESENTED.

Is an employee denied Due Process of Law by a ruling of the Court of Appeals which compels him, as a condition of his continuing employment, to forfeit any right of action against the manufacturer of a negligently designed and unguarded machine which injures him in the regular course of his employment and through no fault of his own.

STATEMENT OF THE CASE.

(Figures in parentheses followed by the letter "A" refer to pages of Petitioner's (Appellant) Appendix in the Court of Appeals, unless context clearly indicates otherwise.)

This products liability suit was brought to recover damages occasioned by the alleged negligence, breach of warranties, and strict liability of Respondent in the design, manufacture and sale of its fork-lift truck. After twice reserving its ruling on Respondent's Motion for a Directed Verdict, the court granted the Motion at the conclusion of all proofs. The Court of Appeals affirmed and denied rehearing.

On May 8, 1964, Petitioner was 28 years old, married with three children when he was permenently injured while operating Respondent's fork-lift truck (142A). Petitioner had been employed in industry all of his adult life except for military service (142A-143A). He had never been fired, disciplined, or involved in an accident (144A).

On March 6, 1964, the Petitioner was hired by AAA Warehouse in Indianapolis, Indiana (143A) as a fork-lift operator with prior experience operating fork-lifts (143A-144A).

The AAA Warehouse was a 4-1/2 story

structure with ceilings which permit stacking of products as high as 15 feet to 20 feet (144A-145A).

The AAA Warehouse was organized and entered the warehousing business in 1957 for the first time. Mr. Jack Larman, its executive officer, had no prior experience in warehousing nor did he have any specific knowledge concerning the use or operation of fork-lift trucks (184A-185A). In 1957, Paul Woerner, a salesman for the authorized distributor for Respondent Clark Equipment in Indianapolis, the W. A. Marschke and Sons Company, called on Mr. Larman (181A-183A). Mr. Woerner sold the fork-lift truck involved in this case (184A). The fork-lift had a 3,000 pound capacity, with a capacity to raise loads well above the operator's head (219A-221A). Before selling this vehicle, Mr. Woerner made a survey of the needs and requirements of the warehouse (184A). Mr. Woerner had been trained for this sales service directly by the Respondent (182A).

Overhead guards were fully known to and routinely installed by Respondent in 1957 when the fork-lifts were manufactured (184A-185A), but only at customer request and as optional equipment.

Salesman Woerner never recommended an overhead guard to AAA Warehouse, and AAA Warehouse never requested an overhead guard for the machine (186A-187A). The overhead guard would have added about

$90.00 to the basic $6,300.00 cost of the equipment (116A).

The fork-lift truck in question was called a "Clarklift". The development of this model vehicle by Respondent Clark Equipment began in 1953, and it was finally marketed in late 1956 (175A-176A).

The 3-1/2 foot wide, 3,000 pound capacity, 4 wheel motor vehicle operates so that merchandise can be picked up with 2 protruding, tapered forks secured to a 6 foot mast at the front of the machine, moved to the location desired, and then lifted as high as 106 inches by elevating the forks up the telescoping mast (203A-221A).

On the day of the accident, the Petitioner was given the task of organizing and consolidating certain furnace cartons (148A).

As usually stacked, these furnace cartons were piled four or five cartons high or about 15 feet (157A). Petitioner's task that day involved locating short stacks of one or two furnace cartons which he would collect so that another man with a larger machine could restack into higher stacks of four and five.

During the course of his work, the Petitioner saw three cartons within an area surrounded by high stacks of cartons (149A and 171A). The high stacks of cartons

formed an aisleway up to these three cartons (171A). The Petitioner drove the Respondent's fork-lift into this aisle-way which was just wide enough for the passage of the machine (171A). The three cartons were not piled upon one another but one carton was just in front of a stack of two and contiguous to them was a stack of furnace cartons, four or five high (150A). Petitioner removed the single carton from among the high stacks of furnace cartons creating a narrow aisle-way not more than three feet wide for Petitioner to move the cartons (149A-171A). This closely confined working space is typical in warehouses as was well known to Respondent Clark Equipment (177A).

Petitioner testified that the stacks did not appear unusual (155A). There was no testimony that Petitioner or anyone else ever had any difficulty with the furnace cartons or that any stack or car-ton had ever fallen before.

Petitioner first removed the one carton to a different location in the warehouse (149A). He then returned to collect and remove the short stack of two cartons (149A). The dimensions of these two cartons each were approximately 3 feet high and 3 feet wide and 2 feet deep (front to back) (149A-150A). As piled upon one another, the stack rose about 6 feet or about 1-1/2 feet-2 feet below the top of the mast (149A). These two cartons

were prevented by the mast from falling into the operator (178A-179A).

Petitioner kept his vehicle in a stationary position just behind the two cartons (164A). He then slipped his forks located on the front of Respondent's Clarklift under this short stack of two cartons (149A). He knew that his forks were 3 feet long and therefore, placed only 2 feet of his forks under the cartons (150A). As the Petitioner judged the situation, his fork could only be under the two cartons. He was not able to see the exact location of his forks because they were hidden under the two cartons and his vision otherwise was blocked by the closely surrounding stacks (166A).

After placing his forks under the two cartons, it was necessary to secure the load by raising the tips of the forks (168A-169A). Raising the tips of the forks did not require moving the vehicle itself and it remained stationary (169A). As the Petitioner raised the tips of the forks under the two cartons, not more than an inch or two, the stack of 4 or 5 cartons just behind the two began to move. Before the Petitioner could do anything, a carton from the stack of 4 or 5 fell and struck him in the head (149A). This blow rendered him a quadriplegic.

It was Petitioner's theory at trial that when he raised the tips of the forks, the tips of the forks contacted the high

stack. There was absolutely no testimony that the Petitioner did anything improper, wrong or negligent in either being where he was or in the use and operation of Respondent's fork-lift. Respondent's own engineer agreed that Petitioner had no practical way of avoiding this accident.

Edward Landry, former Safety Director for the United States Post Office and former President of the American Society of Safety Engineers, testified that a fork-lift truck without an overhead guard was unfit and unsafe for use in high stack areas in 1957 (203A-204A). His opinion was supported by a publication from the National Safety Council (208A-209A) and a Standard of the National Board of Fire Underwriters (207A-208A). Also, Mr. Mauricio Markmann, former Safety Director for the United States Army Quartermaster Corp, testified that a fork-lift truck without an overhead guard cannot be used in high stack areas (213A-214A and 216A).

Respondent's former Director of Engineering testified that it would be safe and proper to use a fork-lift truck in high stack areas (areas where merchandise was above the operator's head) provided that the stacks were stable and not "tippy" (222A-224A and 233A-236A). Mr. Jack Berg, plant manager for Respondent, indicated that at Respondent's own plants, fork-lifts without overhead guards are used in high stack areas and that there

was no policy or rule preventing such use (194A). In effect, the Respondent's experts' position was that unguarded fork-lifts may safely be used even in high stack areas as long as the stacks are orderly and straight.

Petitioner's experts maintained that good and reasonable safety practices make it mandatory that a fork-lift have an overhead guard on it in high stack areas and to this end, the manufacturer must warn owners and users, especially those with limited experience, that a truck without an overhead guard should not be used in high stack areas, because the risk of falling materials cannot be controlled by the operators, regardless of how careful they are (204A, 216A-217A).

After hearing both Petitioner's and Respondent's evidence, the trial court granted Respondent's Motion for a Directed Verdict on the grounds that the lack of a guard and the attendant risks were obvious as a matter of law to the Petitioner. The Court of Appeals affirmed.

REASONS FOR GRANTING THE WRIT.

Petitioner seeks a writ of certiorari from this Court, because the ruling of the Appeals Court applies the common law doctrine of "obviousness of the danger" in an extraordinary and arbitrary way, and in such a way so as to deny Petitioner

both Due Process of Law and trial by jury.

Basically, the Court of Appeals applied the doctrine of "obviousness of the danger" to Petitioner, where there was no evidence of fault on the Petitioner's part, and deprived the Petitioner of his cause of action by charging him with knowledge of a generalized employment danger which Petitioner had no way of avoiding, short of risking his job.

Petitioner was deprived of his cause of action without trial by jury, despite abundant evidence of Respondent's negligence, proximate causation and absence of fault on Petitioner's part.

Petitioner introduced abundant evidence at trial tending to establish Respondent's negligence in failing to equip the fork-lift with an overhead guard. Petitioner showed that overhead guards were known to and frequently installed by Respondent in 1957; that according to experts whose qualifications were unchallenged by Respondent, overhead guards must be used in all high stack areas as a matter of fundamental good practice and fork-lifts without overhead guards may not be sold as general purpose machines without clearly restricting their use by warning or otherwise to low stack areas. It is uncontroverted that Respondent recommended no guard for this machine, installed no guard for this machine and designed and sold this machine as a general purpose warehouse machine with no warning of any

kind regarding using it in high stack areas.

It is furthermore uncontroverted that the presence of an overhead guard would have avoided this injury.

The Court of Appeals ruled that it was as obvious to Petitioner as it was to Respondent that the fork-lift machine designed and built by Respondent had no overhead guard. Consequently, since Petitioner knew that fact, the danger that he might be injured if something fell on him was obvious to Petitioner and, as a matter of law, Respondent was therefore relieved of any duty to guard its machine or warn against its use in high stack areas.

In making its decision, the Court of Appeals ignored the issue of Petitioner's fault. Indeed, there was no evidence in this record of Petitioner's fault. On the contrary, the record shows that Petitioner, an experienced fork-lift operator, was injured while doing his regular work and in a manner wholly in accord with the orders of his employer.

Nor was it claimed or shown that Petitioner violated any work rule of the employer, or any of the recommended operating rules for fork-lift operators formulated and published by Respondent. Respondent's own design engineers, when challenged to find fault in any regard with Petitioner's conduct at the time of

the accident, were unable to do so in any respect.

The testimony of Respondent's own engineers shows that this accident happened because of a fact as to which Petitioner had no knowledge or forewarning, and no practical way of anticipating; the slight, unseen contacting of the forks on Respondent's fork-lift with a second stack immediately behind the stack which Petitioner was lifting, which occurred as he raised his forks.

The common warehouse practice is to store merchandise in continuous stacks and rows. The fork-lift operator, moving his heavy duty machine in and around stacks of merchandise, is always subject to bumping a stack. This is an inherent part of fork-lift operation and recognized as such by Respondent. In fact, this was a key reason for the currency of overhead guards on fork-lifts in 1957, the date the machine in question was manufactured by Respondent. Any operator may and probably all operators have bumped or contacted stacks unintentionally and without fault on the part of the operator.

With the 3,000 pound capacity of this machine, only the slightest engagement of the second stack was necessary to bump and destabilize that stack, producing the accident. The second stack was perfectly normal in appearance to Petitioner. Prior to the accident, Petitioner had absolutely

no warning or indication of any kind that his fork tips had in fact contacted stack two, and that the engagement and lifting of stack one would destabilize stack two, precipitating the accident. Neither during the voluminous depositions of Respondent's own engineers, nor at the trial did Respondent suggest in any way that Petitioner could have learned of and avoided the peril which caused his injury.

Despite abundant evidence of Respondent's negligence, despite the absence of any evidence of fault on Petitioner's part and despite the uncontroverted, proximate relationship between the lack of the guard and Petitioner's injury, the Court of Appeals concluded that Respondent was not liable as a matter of law on the sole ground that the danger that a box might fall on Petitioner's unguarded fork-lift had to be obvious to him.

Under the rule applied by the Court of Appeals, it could make no difference to the result in this case had the box fallen on Petitioner through the direct act of a third person, for example, if a co-worker handling boxes above Petitioner had negligently caused a box to fall on him. Under the logic of the Court of Appeals, the risk is equally obvious regardless of why the box falls.

Thus, under the Court of Appeals' ruling, a manufacturer designs and sells

a fork-lift machine without an overhead guard; overhead guards are known and used to avoid the hazards of falling materials; the machine is intended for general purpose warehouse use without any limitation or warnings as to high stack areas; the operator is permanently injured because of the absence of the guard, a hazard created by the manufacturer; the accident occurs through no fault whatsoever on the part of the operator - all conventional elements normally allowing recovery are present, negligence of the Defendant, proximate cause and no fault on the part of the Plaintiff. The operator is denied his day in court because and only because he used the machine at all.

Petitioner respectfully submits that this result represents the kind of gross, judicial error which this Court has suggested would violate Due Process, Roberts v. New York Central, 295 U.S. 264 at p. 282 (1934).

First, it forces the worker to an unfair and wholly unreasonable choice: Refuse to work on or around unguarded equipment and risk disciplinary action at the hands of your employer. Or if you accept such work, surrender your common law right of action against the manufacturer of negligently designed and unguarded equipment which causes you injury, despite the exercise of all due care on your part. There is no reason in law, logic or policy to support such a rule.

As a practical matter, this rule deprives the worker of all reasonable means of protecting his own safety, vis a vis, third party manufacturers.

The ordinary consumer may at least exercise a buyer's option and refuse to buy dangerous or unguarded machines.

Second, the Court of Appeals' opinion manifestly misapplies the doctrine of "obvious danger" as applied to the law of products liability in Indiana or anywhere else, for that matter. This is because on the face of it, the danger which caused this accident was the position of the forks contacting the second stack. The position of the tips of his forks underneath the cartons was the danger, but it was anything but "obvious" and all the evidence shows that Petitioner had no reasonable way of knowing about that danger.

The Court of Appeals acknowledges that under Indiana law, the manufacturer will be liable for products which present a "latent" as opposed to a "patent" danger (409 F.2d 563, and cases cited at footnotes 4 and 5), but avoids this dilemna by simply labelling the absence of the guard as the "obvious danger". Of course, Petitioner knew the machine had no guard, but that fact told him nothing as to the immediacy of the danger arising from the contact of his forks with the second stack.

The only reason that "obvious dangers" defeat a Plaintiff's recovery is that, knowing the danger and its immediacy, the Plaintiff can and should act prudently to avoid injury. But the lack of the overhead guard tells Petitioner only one thing: If you use this machine for its intended purpose as a general purpose warehouse machine, you may be injured if something falls on you. Armed with this kind of information, Petitioner can avoid injury only by avoiding Respondent's product, i.e., refusing to work on the machine at all. The only "danger", the knowledge of which would have allowed Petitioner to avoid this accident, was the danger posed by the contacting of his forks with the second stack, and that knowledge he did not have and could not reasonably be expected to have obtained.

Third, the arbitrary nature of the lower court's ruling is highlighted by the diametrically opposed result reached by the Third Circuit in Brandon v. Yale, Eaton & Towne, 342 F.2d 519 (CA, 3rd 1965). The Third Circuit, sitting en banc and applying the same basic law as was applied by the Court below in the case at bar (Rest. of Torts, 2d, §388), in a strikingly similar factual setting, reached a diametrically opposed result and affirmed a Plaintiff's jury verdict.

In Brandon, supra, as in this case, the Plaintiff was the driver of a fork-lift truck. In Brandon, as here, the truck was

not equipped with an overhead guard. In Brandon, as here, the truck was being used at the time of the accident in high stack areas with cartons stacked above the driver's head. In Brandon, as here, the driver was struck on the head by falling materials. In Brandon, as here, the materials fell on the Plaintiff because of the action of the forks of the fork-lift truck itself. In Brandon, as here, there was evidence that the employer of the Plaintiff had never been warned by the manufacturer not to use the truck in high stack areas, and there as here, the Plaintiff driver sustained permanent, paralyzing spinal injuries as a result of the accident.

In Brandon, Chief Judge Biggs and Judges McLaughin, Kalodner, Galey, Ganey, Smith and Freedman rejected the manufacturer's contention that the danger of falling loads was obvious as a matter of law to fork-lift operators operating their fork-lifts in high stack areas. The seven Judges also concluded that the defense claim of obviousness of the danger, under the circumstances, required a jury determination.

CONCLUSION.

"One injured as a result of the negligence of another has a right of action against that other to recover damages sustained by reason of such injury. That

right of action is property." (within the meaning of the Fourteenth Amendment). Martinez v. Fox Valley Bus Lines, 17 F. Supp. 576 (ND Ill. 1936), Kent's Commentaries (Comstock Ed. 2) 473.

In this case, Petitioner, 28 years old at the time of his accident, is permanently paralyzed below the neck for the rest of his life. His property right to redress the wrong involved in this case has been denied him without a trial by jury, despite the introduction of abundant evidence of each element conventionally required under the applicable common law. Int'l Terminal Operating Co., Inc. v. N.V. Nederl.-Americ. Stoomv. Maats., 89 S.Ct. 53 (1968).

Petitioner knows that this Court does not normally review products liability cases where jurisdiction is founded on Diversity of Citizenship. The fact that the Court of Appeals applied Indiana law incorrectly would not in and of itself warrant review by this Court. But surely there is a point where the arbitrary application of state law does require review. Byrd v. Blue Ridge Rural Electric Cooperative, 356 U.S. 525 (1958).

The rule which the Court of Appeals is actually applying here is this: By the act of accepting employment and going to work on equipment assigned to him by his employer, Petitioner thereby forfeited

any right to sue third party manufacturers of negligently designed and unguarded machines which caused him injury, despite the exercise of all due care on his part.

Had the Court articulated its result in these terms, this Court might very well review this case. The failure of the Court of Appeals to openly express its holding should not insulate its opinion.

Petitioner respectfully submits that basic fairness and a due regard for the proper administration of justice in the Federal Courts call for a review of this case.

Respectfully submitted,

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APPENDIX A.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

United States Court of Appeals for the Seventh Circuit.

Charles W. Posey, Appellant, vs. Clark Equipment Company, Appellee. No. 16766.

(April 15, 1969)

Appeal from the United States District Court for the Southern District of Indiana.

Before: Duffy, Senior Circuit Judge, Kiley and Fairchild, Circuit Judges.

Fairchild, Circuit Judge:

Charles Posey brought this personal injury action against Clark Equipment Company.[1] Posey was injured at his employment while operating a fork-lift truck manufactured by Clark. He alleged negligence and strict liability in tort, as well as breach of warranty, a theory he no longer pursues. At the close of all the evidence, the district court directed

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[1] Jurisdiction is founded on diversity. The parties have treated Indiana law as controlling.

a verdict for Clark. Posey has appealed.

Posey was operating the fork lift in a so-called high stack area of his employer's warehouse. A carton in which a furnace was packed fell from the top of a stack, hit Posey, and very seriously injured him. The fork lift was not equipped with an overhead guard to protect the operator from falling objects. Clark designed this type of fork lift so that, without a guard, it could enter areas such as street trucks, with low head room. The fork lift was also capable, however, of lifting an article to 106 inches, almost nine feet. Clark offered a guard as an optional accessory, and it could be installed in about ten minutes. Posey's employer did not, however, purchase a guard. Although the fork lift bore a warning to be careful, it bore no warning that a guard should be attached before use in high stack areas. The fork lift was purchased from a Clark dealer in 1957 and Posey was injured in 1964.

Posey's claim, in essence, is that Clark should have refused to sell the fork lift without a guard, or have attached a warning about using a guard in high stack areas, or both. There was expert testimony and other evidence that a fork lift capable of lifting 100 inches or more would be considered a high stacking machine, and that it is considered dangerous to operate a fork lift in high stack areas without a guard.

A June, 1957 bulletin[2] states: "Where high tiering is necessary special overhead protection for the lift truck and the operator shall be provided" and "The word 'shall' indicates provisions which are considered essential for protection of life and property." A 1951 publication[3] says: "Fork trucks capable of lifting loads higher than the operator's head should have substantial canopy guards and back guards on the face of the forks where small objects or unstable loads are carried" and a caption under a picture of a lift truck is "Fork lift truck equipped with canopy guard and back guard on the face of the forks. Fork trucks capable of lifting loads higher than the operator's head should have guards of this type." It is apparent that these statements are most directly concerned with the danger that the load being lifted will fall off the forks.

At the front of the fork lift is a double column structure called the mast.

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[2]Standards of the National Board of Fire Underwriters for the Use, Maintenance and Operation of Industrial Trucks As Recommended by the National Fire Protection Association.

[3]Accident Prevention Manual for Industrial Operations, National Safety Council, 2d ed. pp. 12-1 and 12-2.

Two fork blades jut forward from it. The mast can be inclined forward or back, and the forks tilt accordingly. The forks can be raised along the mast and the mast can be extended upwards. The mast on this particular fork lift, when fully retracted, is 77 inches high. With the mast in that position, the fork lift can be driven into many low clearance areas. If the guard were installed, its top would be 83 inches off the ground and it would prevent the fork lift from entering many of these areas. It is clear, however, that this fork lift was capable of lifting objects well above the operator's head, and there is evidence that an overhead guard ought to be used when it is so operated.

May the manufacturer be held liable to an employee of the buyer, where the fork lift is designed for use both in areas where a guard is unnecessary and could not be used and where a guard may be deemed necessary, if the manufacturer fails to supply a guard and to give warning that the guard should be installed during operations of the latter type?

On the day of the accident, Posey, using the fork lift referred to, and another employee with a different type of lift truck, were organizing and consolidating stacks of cartons in their employer's warehouse. Each carton contained a furnace unit, was three feet high, three feet long, and two feet wide. The

full stacks contained four or five cartons. Posey was picking up single cartons and short stacks from among the full stacks and moving them out to the other employee. The latter would build them into full stacks.

Just before the accident, Posey drove his truck down an aisle between full stacks. At the end was a stack of two cartons, and beyond it a full stack. Posey was facing one of the 3' x 3' sides, so that the depth of the stack was two feet. Posey tilted his forks downward, inserted them under the short stack and tilted his forks upward. He saw the full stack beyond commence to sway, and the carton at the top of that stack fell on him. It may be inferred that Posey accidentally inserted his forks far enough so that their ends caught under the full stack and caused it to sway.

It would, of course, be obvious to anyone who thought about it that if a carton became dislodged from a high stack, its falling would endanger the operator of the fork lift, and that there was no guard to protect him.

Although Posey had operated fork lifts for several years, he was not familiar with overhead guards, and probably did not know they were available. The dealer's salesman who had sold the truck to Posey's employer thought that the question of overhead guards was discussed, but could not

recall whether he had recommended purchase of a guard or said the truck could be used in high stack areas without a guard. Except for the inferences which might be drawn from the fact that Clark designed and offered a guard, there was no evidence that Clark, in 1957, had superior knowledge of the likelihood of an accident of the type which occurred.

Posey's theory appears to be that if there had been a warning notice on the truck, the employer might have purchased a guard and instructed his employees to install it whenever the truck was used among high stacks, and Posey as well as other employees would have been alerted to the importance of using the guard.

In directing a verdict, Judge Dillin concluded that the danger of an object falling upon an unprotected operator was so obvious that the user of the truck would reasonably be expected to know about it.

Although Indiana law recognizes products liability based on negligence, in the absence of privity, the defect must be hidden, and not normally observable, constituting a latent danger.[4] Although a manufacturer who has actual or constructive knowledge of an unobvious

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[4] J. I. Case Company v. Sandefur (1965), 245 Ind. 213, 197 N.E.2d 519.

danger in the use of his product is subject to liability for negligence for failure to warn users of the danger, he has no duty to warn if the danger be obvious.[5]

In 1965, Judge Eschbach of the district court for the northern district of Indiana considered a complaint against this defendant, Clark, claiming strict liability for the sale of an allegedly defective and unreasonably dangerous fork lift.[6] He concluded that the doctrine of strict liability for sale of a product "in a defective condition unreasonably dangerous to the user or consumer", as stated in Restatement, Torts 2d sec. 402A is the law of Indiana. We have no reason to disagree.

A warning may be necessary to prevent the product from being unreasonably dan-

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5 Indiana Nat. Bank of Indianapolis v. DeLaval Separator Co. (7th Cir. 1968) 389 F.2d 674, applying Indiana law. In the special case of explosives, where a high degree of danger is obvious, but the precautions required in order to protect the user's safety are not, the manufacturer is liable for failure to warn. Eck v. E. I. DuPont De Nemours & Company (7th Cir. 1968), 393 F2d 197, applying Indiana law.

6 Greeno v. Clark Equipment Company (N. D. Ind. 1965), 237 F.Supp. 427.

gerous; "But a seller is not required to warn . . . when the danger, or potentiality of danger, is generally known and recognized."[7] "The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics."[8]

Sec. 388 of the Restatement is also instructive with respect to the duty of a supplier of a chattel to warn users where he knows or has reason to know that the chattel is dangerous. One element of liability is that he "has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition."

Comment k, on that element, says, in part, "However, the condition, although readily observable, may be one which only persons of special experience would realize to be dangerous. In such case, if the supplier, having such special experience, knows that the condition involves danger and has no reason to believe that those who use it will have such special experience as will enable them to perceive the danger, he is required to inform them of the risk of which he himself knows and

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[7]Restatement, Torts 2d sec. 402A, Comment j.

[8]Ibid, Comment i.

which he has no reason to suppose that they will realize."

Although defendant Clark, as a leading manufacturer of fork lifts, was probably more aware of the range of problems and hazards encountered in their use than the ordinary user or operator of fork lifts, we conclude as a matter of law that this is not a situation where only persons of its special experience would realize the danger which might befall an unprotected operator when working in proximity to high stacks of cartons. Plaintiff urges, essentially, that this question ought to be left to a jury, but it is our judgment that there is no evidence to support a finding that Clark had a duty, under the circumstances, to supply a warning notice.

Plaintiff Posey relies heavily on Brandon v. Yale & Towne Manufacturing Co. (E.D.Pa. 1963), 220 F.Supp. 855, affirmed (3rd Cir. 1965), 342 F.2d 519. A jury verdict against the manufacturer of a fork lift was permitted to stand. The manufacturer had failed to supply an overhead guard and a load back rest, and failed to warn plaintiff operator that without them the fork lift should not be used for high stacking. There are a number of factual differences between Brandon and the case at bar. The truck in Brandon was a 90 inch truck, capable of lifting its forks to twelve feet, and presumably unusable in street trucks and low clearance areas. It was used to lift stacks of cardboard to

an overall height of seventeen or eighteen feet. It was in this process when an 800 pound load slid off and fell onto plaintiff operator. An officer of defendant manufacturer had familiarized himself with the intended uses. Plaintiff's employer had ordered a guard and load back rest (designed to prevent the load from sliding off the forks), but defendant delivered the machine without them because they were unavailable and plaintiff's employer urgently needed the machine. Defendant manufacturer recognized the danger of using the machine for high stacking without the safety equipment, and warned plaintiff's employer, but did not provide a warning notice for the operator.

There is no suggestion that the Brandon fork lift was designed for a type of use where a guard would be unnecessary and impossible to use, as in the case at bar. It was being used in high stacking when the accident occurred, the accident resulted from such use, and the manufacturer conceded the use was dangerous in the absence of the safety devices. None of these facts is true in the case before us. The Brandon decision does not purport to apply the law of Indiana, and seems distinguishable in any event.

The judgment is affirmed.

APPENDIX B.

ORDER DENYING PETITION FOR REHEARING.

United States Court of Appeals for the Seventh Circuit.

Excerpt from Proceedings of Wednesday, June 4, 1969.

Before Duffy, Kiley and Fairchild, Circuit Judges.

IT IS ORDERED by the Court that the Petition for Rehearing filed in the above entitled cause be and the same is hereby denied.